IN THE HIGH COURT OF UTTARAKHAND ATNAINITAL

CRIMINAL APPEAL No. 2059 of 2001
Old No. 2412 /1987

Chandu alias Chandra Mohan
S/o Raddi Das, R/o vill. Turari Patti
Dabral Siyon, Teh. Lansdowne, Pauri Garhwal.

.....Appellant

Versus

The State ...Opposite Party

Dated: June 14, 2007

Sri Vipul Sharma, learned counsel for appellant.
Sri Amit Bhatt Addl. G.A for the State.

HON. DHARAM VEER, J.

This appeal, preferred under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter to be referred as Cr.P.C.), is directed against the judgment and order dated 23.02.1987 passed by Sessions Judge, Pauri Garhwal in Session Trial No.3/1986 whereby, the learned Sessions Judge, has convicted the appellant under Section 404 I.P.C. (Indian Penal Code 1860, hereinafter to be referred as I.P.C.) and awarded sentence of 2 years R.I. The appellant was further held guilty of the offence punishable under Section 201 I.P.C. and was awarded sentence of one year R.I. Both these sentences were directed to run concurrently.

2. In brief, the prosecution story is that a written report of the incident Ex.Ka.1 was given by Harbansh Singh to the Patti, Patwari, Dabralsuon Chelusain on 4.11.1985. Allegations had been that the informant and one Vidya Sagar son of Nem Chand, resident of Tibber in District Gurudaspur (Punjab) were engaged in sale and purchase of old and broken pieces of jewelry of silver. On 24.10.1985, Harbansh Singh and Vidhya Sagar reached Chalusain in connection with their business. On 25.10.1985, at about 8 A.M., Harbansh Singh proceeded towards Akhori and Suralgaon villages, while Vidhya Sagar left for village

Surari, on the understanding that they would meet during evening hours in village Silogi. When Vidya Sagar did not reach village Silogi till evening hours on 26.10.1985, Harbansh Singh set out for his search in Surari and adjoining villages. Some short information gathered by Harbansh Singh had been that Vidya Sagar was seen proceeding towards village Shimla with appellant Chandu resident of village Surari. Harbansh Singh met Chandu and made inquiry, but Chandu denied having ever accompanied Vidya Sagar and at the same time threatened Harbansh Singh of loss to property and life. Therefore, Harbansh Singh suspected that Chandu might have himself or with the help of others caused death of Vidya Sagar in order to lay hands on valuables.

3. On this F.I.R. the investigation was started by the Patwari, PW.7 Pyare Lal. (In Rural hill areas of Uttarakhand, the Patwaris are being vested with Police Powers.) He has prepared the Fards for recovery; those Fards are Ex.Ka.2 and Ex.Ka.5. Later on, the dead body of Vidhya Sagar was recovered on 7.11.1985 and the inquest report was prepared by the Patwari on the same day on 7.11.1985, that report is Ex.Ka.9. He has prepared the site plan of the place of occurrence, that is Ex.Ka.11. The dead body was sent for post mortem and then the post mortem of the dead body was conducted, that post mortem report is Ex.Ka.4. Later on, the investigation was transferred to another Patwari PW.8 Mohan Prashad. He has also prepared a Fard for the recovery, that Fard is Ex.Ka.3. The report of the Scientific Officer is Ex.Ka.6. After completing the investigation, the Patwari has submitted the charge sheet Ex.Ka.14.

4. The Munsif Magistrate Lansdowne, has committed the case to the court of Sessions on 10.02.1986. Sessions Judge, Pauri Garhwal has framed the charge against the

appellant Chandu and accused Dharmander under Section 302 I.P.C. read with section 34 I.P.C. and under Section 201 I.P.C. on 17.04.1986. The charge was explained to them who pleaded not guilty and claimed to be tried. The charge was framed against accused Raddi Das, Gunduru, Komal Singh and Gulab Singh on 17.04.1986 under Section 201 I.P.C. The charge was also explained to them who pleaded not guilty and claimed to be tried.

5. To prove its case, the prosecution has examined PW.1 Anand Mani, PW.2 Ram Chandra Singh, PW.3 Harish Singh, PW.4 Jhabbar Singh, PW.5 Harbansh Singh, PW.6 Satte Singh, PW.7 Pyare Lal, Patwari, and PW.8 Mohan Prasad, Patwari. After that the statements of the appellants and other accused persons were recorded under Section 313 Cr.P.C. who have denied the allegations made against them. However, they did not produce any evidence in their defence.

6. After appreciating the evidence on record, the learned Sessions Judge, Pauri Garhwal vide his judgment and order dated 23.02.1987 has convicted the appellant Chandu under Section 404/201 I.P.C. and awarded two years R.I. under Section 404 I.P.C. and one year R.I. under Section 201 I.P.C. Both these sentences were directed to run concurrently. The other co-accused namely Gunduru, Raddi Das, Komal Singh, Gulab Singh were acquitted for the charge framed against them under Section 201 I.P.C. Accused Dharmendra was acquitted for the offence punishable u/s 302 r/w 34 IPC and u/s 201 IPC. Appellant Chandu was also acquitted for the offence punishable under Section 302 I.P.C. read with 34 I.P.C. Against the said order dated 23.02.1987, the appellant has filed the present appeal.

7. To prove its case, the prosecution has examined PW.1 Anand Mani, who has stated in his statement that Harbansh was doing business of sale and purchase of silver. He had come on 4.11.1985 in his shop at Chailusen. He had told him that his companion Vidhya Sagar was missing and he told him to write a report on his dictation. He had written a report i.e. Ex.Ka.1.

8. PW.2 is Ram Chandra Singh, who was the Pradhan of village Surari. He had stated that on 7.11.1985 on the pointing out of appellant Chandu, a dead body was recovered from the rivulet (Nala), which was said to be the dead body of Vidhya Sagar. Patwari has prepared the inquest report and the dead body was sent to Pauri in a sealed condition. He has also proved the Panchayatnama. He has further stated that on the pointing out of appellant Chandu, one Diary, Taraju, Baat and some clothes were recovered in a dug near Surari village. A Fard was prepared on the spot i.e. Ex.Ka.2. He has further stated that on the pointing out of the appellant on 13.11.1985 in the courtyard of his house, Rs.800/- were recovered in a Polythene bag. The Patwari has prepared the recovery memo, that memo is Ex.Ka.3. In cross examination, he has stated that Chandu had not given any statement in his presence to the Patwari.

9. PW.3 is Harish Singh. He has not supported the prosecution case and was declared hostile by the prosecution. He has stated that in his village on October-November, 1985, nobody had come to sell silver. He had further stated that on 25.10.1985, he had not seen anybody else along with Chandu going towards village Shimla. He had further stated that the Patwari had not taken his statement.

10. PW.4 is Jhabbar Singh, who has also not supported the prosecution case and was declared hostile by the prosecution.

11. PW.5 is Harbansh Singh, complainant of the case, who has stated that he and Vidhya Sagar (the deceased) were doing the business of sale and purchase of old silver. On 24.10.1985, they reached Chailusen. On the next day morning, Vidhya Sagar had gone to Surari village and he had told him that in the next day evening, they would meet in Silogi. When Vidhya Sagar did not reach up to 26.10.1985 to 27.10.1985 to Silogi, then he had gone to Chailusen on 28.10.1985 for his search. He came to know that Vidhya Sagar had not reached there. Then he went to Dugadda in his room where he met Mukairaj, who was also busy in the same business. Then Mukhariaj had reached to Chailusen. Mukhairaj had gone towards Pagari, Khiradiya and Simla and he himself had gone towards Surari. There the people had told him that Vidhya Sagar, the silver seller had come but he was not seen after 25.10.1985. Then he went to Chailusen and Surari. One boy had told him that he had seen the silver seller (Chandiwala) along with Chandu on 25.10.1985. He went to the house of Chandu and then Chandu had told him that he had never gone with Chandiwala. On his asking, Chandu had abused him. Then he went to the Pradhan. Chandu had tried to run away but he was caught by his companion. He could not get Patwari for two days. After that he had dictated the F.I.R. to Anand Mani, that was handed over to Patwari, that is Ex.Ka.1. There Chandu had met him and he was caught by the Peon (Chaprasi) of Patwari. Then he was interrogated by the Patwari, but Patwari could not get any information from the appellant Chandu. Then he had gone to the village Surari along with appellant Chandu and police. They were 40-45

persons. The police personnel have recovered a Khukhri from one place. Then the police personnel had inquired from Chandu but he had not informed about anything. Then they have come back to the Patwari Chowki. On the same night at 10:00 P.M., he had stayed in a hotel on the first floor of Police Chowki. Then the Peon (Chaprasi) Sohan Lal had come to him. He had told him that appellant Chandu had admitted that he had committed the murder of Chandiwala along with Dharmendra and he was ready to give the dead body. At that time, he along with another 15 persons along with Chandu had gone in the forest area towards Surari, but they could not get any success. He had come back and after some time the dead body was recovered. The dead body was naked and no other item was there. Then the appellant Chandu had told about another items which were beneath the stone near the Gadhera (Nala). The Patwai also got the villagers and then in the night at about 1:30 P.M., some items were recovered beneath the stones. Those items were the Clothes, Taraju (Pair of Scales), Baat(Scales) and some items of Silver. He has stated in the cross examination that up to his arrest, appellant Chandu was in his own house. He has further stated that the first report was written by Dabral on his dictation, but he could not handed over that report to the Patwari because the Patwari could not meet him. Then again on 4th, the second report was prepared by him and that report was given to Patwari. He has also stated that Khukhri and clothes of the deceased were not recovered in his presence "**[kq[kjh o e`rd ds diM+s o lkeku ftl txg ls cjken gq, Fks eSa ogk¡ ekStwn ugha Fkk**"-

12. PW.6 is Satte Singh who has stated that he was employed in November, 1985 along with the Patti Patwari, Dabralsuen at Chalusain. The recovery of the articles was

made on the pointing out of the appellant. On his pointing out a Khukhri. Some silver coins in a bag, Payjab and Hasli were recovered. The Patwari had prepared the Fard and he had also signed on the Fard, i.e. Ex.Ka.5. In cross-examination he has stated that on that very day, the appellant Chandu was arrested by Patwari. He has further stated that before the recovery, no statement of Chandu was taken by the Patwari in his presence.

13. PW.7 is Pyara Lal, Patwari who has stated that on 4.11.1985, he was the In-Charge Patwari of Dabralsuen area (III) and up to 10.11.1985, he was the In-Charge Patwari of this area. On 4.11.1985, Harbansh Singh had given a report Ex.Ka.1. On the basis of that, he had made the entry in the G.D. on the same day. He has recorded the statement of Harbansh Singh on 5.11.1985. He had searched the deceased in village Shimla and Surari. He had inquired from the people. He had searched Chandu but he could not get any information about him. On 6.11.1985 when he reached in the Chowki Dabralsuen, there he met Chandu along with Peons (Chaprasi) and he had inquired from Chandu. Then appellant Chandu had given him information about the dead body but due to the night he could not go on the spot. On the next day morning on 7.11.1985, the witness Ram Chandra, Jot Singh, Narendra Singh, Bhopal Singh were called by him. The dead body was recovered in the presence of above said witnesses. The recovery memo of dead body was prepared on the spot and the inquest report was prepared by him i.e. Ex.Ka.9. He had prepared the map of the place of the recovery and after that Chandu was arrested on the same day. After the arrest of appellant Chandu, his statement was again taken and on his pointing out from the village Surari in a barren field, some clothes i.e. Shirt White Terricot, Sweater, Pant,

Kaccha-Baniyan (Under-garments), Payjama(Trouser), Jurab (Socks), Tahmad, Thaila (Bag), Thaily Lal (Red Bag), Diary, Identity-Card, (Taraju)Pair of Sales, Baat (Scales), 500gm, 200gm, 100 gm 2 pieces, 50 gm, 20 gm, 10gm, 5gm, and 2 baats of 1gm, and one Casoti were recovered on the spot. He has prepared the map of the above-mentioned recovered items, that is on the file which is Paper No.8/Ka and that was marked as Ex.Ka.10 He had prepared a Fard on the spot, that Fard is Ex.Ka.2. After that, about 400 gms. Silver and a Khukhri were recovered on the pointing out of Chandu. A Fard was prepared on the spot, that Fard is Ex.Ka.5. The sealed bundle was opened in the court and he had exhibited the above said articles, that articles are Ex.1 to Ex.22. In cross-examination, he has stated that he had not enquired the details of the recovered items.

14. P.W8 is Mohan Prasad Patwari, who has statted that in November 1985, he was on the post of Patwari. The investigation was entrusted to him and before him Pyaray Lal was conducting the investigation because he was on leave. During the Investigation, he has recorded the statements of the witnesses. On 136.1.1985, he again arrested Chandu appellant and Rs.800/- were recovered on his pointing out. A Fard was also prepared that is Ex.Ka.3. He has also taken the search of Chandu's house but nothing was recovered from his house. After competing the investigation, he had field the charge sheet Ex.Ka.14.

15. After that the statements of the appellant was recorded under Section 313 Cr.P.C. who had denied the allegations made against him.

16. I have heard Vipul Sharma, learned counsel for the appellant and Sri Amit Bhatt, learned Add. G.A. for the State.

17. Learned counsel for the appellant has argued that on the same set of evidence, the appellant was acquitted under Section 302 read with section 34 I.P.C. but he was convicted under Section 404/201 I.P.C. Learned counsel for the appellant has submitted that there is no evidence against the appellant under Section 404/201 I.P.C. Learned counsel for the appellant has further submitted that PW.1 Anand Mani is a formal witness who was the subscriber of the F.I.R. and PW.2 Ram Chandra Singh has not stated in his statement that the recovered items which were recovered in his presence, were the items of the deceased Vidhya Sagar. PW.3 Harish Singh is the witness who was declared hostile by the prosecution and has not supported the prosecution case. PW.4 is Jhabbar Singh who was also declared hostile by the prosecution and has not supported the prosecution case. PW.5 is Harbansh Singh who was the complainant of the case and he was the person who had lodged the F.I.R. and he had also stated in his cross-examination that the Khukhri and clothes of the deceased and other items were not recovered in his presence. In this way, this witness has also not supported the prosecution case. PW.6 is Satte Singh who was employed and posted along with Patwari. He has also stated in the cross-examination that appellant Chandu was arrested by the Patwari on the same day i.e. 7.11.1985. PW.7 is Pyaray Lal, Patwari who is a formal witness, who has stated that the appellant Chandu was sent for judicial remand on 8.11.1985 but he was released by the Magistrate on 10.11.1985 on furnishing of his personal bond. PW.8 Mohan Prasad, has again arrested the

appellant on 13.11.1985 and on pointing out of the appellant, Rs. 800/- were recovered.

18. Learned counsel for the appellant has also submitted that from the evidence discussed above, there is no evidence to show that the items shown to be recovered on the pointing out of the appellant were the items of deceased Vidhya Sagar. He has further submitted that the items shown to be recovered from the barren (banjar) land and it is not the land of the appellant. He has also submitted that identification of these items were not conducted before any Magistrate as per law. He has further submitted that the prosecution has completely failed to establish that the recovered items shown on the pointing out of the appellant were the items of deceased Vidhya Sagar and even from the dead body of Vidhya Sagar, it is not proved that the recovered dead body was the dead body of Vidhya Sagar.

19. Learned counsel for the appellant further submitted that the clothes shown to be recovered were sent for chemical examination, these are mentioned in Ex.Ka-6 as Item No.1 to Item No.22 viz. (1) Khukhri, (2) Shirt (3) Shirt (4) Sweater (5) Pant (6) Underwear (7) Undershirt, (8) Payjama (Trouser) (9) Undershirt (10) Socks (11) Tahmad (12) Thaily Lal (Red Bag) (13) Diary (14) Identity Card (15) Pair of Scales (Taraju) (16) Baat (Scales) (17) Casoti (18) Large bag (19) Coloured Deep Bag (20) Green Underwear (21) Cap and (22) piece of cloth of hand. From a perusal of the report, it reveals that on the clothes No.1 to 6, 8, 9 and from 11 to 22, blood was not found. Thus, he has submitted that as the blood was not found on the said clothes, hence it cannot be said that the clothes are recovered as shown by the prosecution and these are the same clothes which were worn by the deceased Vidhya

Sagar at the time of his death. He has further submitted that these items were not identified by the witnesses before any Magistrate as per law. The clothes which were shown to be recovered by the prosecution, were sent for chemical examination, that report is Ex.Ka-6 on the record which shows that on the clothes No.1 to 6,8, 9 and from 11 to 22, blood was not found. Thus, it creates a doubt in the prosecution story. He has further submitted that the Khukhri which was shown to be recovered from the possession of the appellant was not believed by the Sessions Judge. Hence, the appellant was acquitted for the charge leveled against him under Section 302 I.P.C. read with 34 I.P.C.

20. From the evidence discussed above and after careful perusal of the evidence, it is true that not a single witness has stated that the recovered items shown on the pointing out of the appellant were the items of deceased Vidhya Sagar and even, it is not proved beyond reasonable doubt that the recovered items belonged to deceased Vidhya Sagar and moreover these items were not identified by the witnesses in the presence of the Magistrate, which creates a doubt in the prosecution story. Even it is not proved that the items shown to be recovered were recovered on the pointing out of the appellant Chandu. The prosecution has not proved its case against the appellant beyond reasonable doubt.

21. The appellant was arrested on 7.11.1985 and was released on personal bond by the order of court on 10.11.1985. Then the appellant was again arrested by the Patwari on 13.11.1985 and after that arrest, the recovery of Rs.800/- was shown from the courtyard of the appellant. From the evidence discussed above, it is not proved that

the said money belonged to deceased Vidhya Sagar and even the money was not mentioned in the FIR and this money was not even identified in the identification procedure before the Magistrate and there is also no evidence that the said money was even recovered. Further, the arrest of the appellant on 13.11.1985 is not as per law. There is also no explanation that when the appellant was released on bail by the order of Magistrate on 10.11.1985, then for the same offence, how the Patwari has arrested him on 13.11.1985 and hence the arrest of the appellant was also not as per law. Thus, it also creates a doubt in the prosecution case.

22. On the basis of the above said evidence, the appellant was arrested by the Patwari on 7.11.1985 while Vidhya Sagar was missing since 25.10.1985. The F.I.R. of the said evidence was lodged on 4.11.1985 but there was no G.D. produced of 4.11.1985 in the court, which also creates a doubt in the prosecution case. Even the chick F.I.R. was not filed . All these circumstances creates doubt in the prosecution case. In view of this, the existence of the F.I.R. itself is doubtful and is not proved as per the law.

23. From the evidence discussed above, the prosecution has not established the offence against the appellant under Sections 404 I.P.C. and 201 I.P.C. against the appellant beyond reasonable doubt and as such, the appeal deserves to be allowed.

24. For the reasons discussed above, the judgment and order dated 23.02.1987 passed by Sessions Judge Pauri Garhwal is hereby set aside. The conviction and sentence awarded to the appellant under Sections 404 I.P.C. and 201 I.P.C. for two years R.I. and one year R.I. respectively is

also set aside. The appellant is on bail. He need not surrender. His bail bonds are cancelled. His sureties are discharged.

(Dharam Veer, J.)

June 14, 2007
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